UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SMOKE HOUSE RESTAURANT, INC.

and

Cases 31-CA-26240
31-CA-26418
31-CA-26285

HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES UNION, LOCAL 11, AFL-CIO

RESPONDENT'S REPLY BRIEF TO ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

LEON JENKINS, REPRESENTATIVE
SMOKE HOUSE RESTAURANT, INC.
4420 LAKESIDE DRIVE
BURBANK, CA. 91505
310-904-8371

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STATUTES

Now Comes Smoke House Restaurant, Inc., thought its representative, Leon Jenkins, and files the following Reply Brief to Acting General Counsel's (AGC) Response to Respondent's Exceptions to the Decision of the Administrative Law Judge.

INTRODUCTION

THE ACTING GENERAL COUNSEL RESPONSES TO THE EXCEPTIONS FAIL TO ADDRESS THE ALJ'S ERRORS IN LAW AND FACT

The AGC counter-arguments to the many errors in the Administrative Law Judge's (ALJ) decision lacks merit, because they do not respond to the ALJ decision denying Respondent the opportunity to present evidence and defenses under the principles cited in *Planned Building Services, Inc. v. NLRB*, 347 NLRB 670, 2006.

The ACG cites no evidence (facts) that the unit employees had a future interest in the viability of the Healthcare plan, only case law, and insist as does the ALJ that the citation of case law along is sufficient to prove future viability. The Union, AGC and ALJ confessed in open court that evidence is not necessary to prove employees' future interest in the viability in a health plan, notwithstanding Board rulings in *Sedgwick Realty LLC*, 337 NLRB, 245, at 248, fn. 8 (2001), *Stone Boat Yard v. NLRB,* 715 F2d 441(1983).

The ACG does not address the ALJ shortcomings in his failure to follow *Planned Building Services, Inc. v. NLRB*, 347 NLRB 670, 2006 guidelines as to viable defenses employers may offer in a compliance hearing. The record in this case is repleted with instances that Respondent was not allowed to present evidence of impasse, good faith negotiations, and impediments to negotiations by the Union and General Counsel.

The AGC misinterpretation of the United States Supreme Court decision concerning the differences in speculative damages and actual damages in noteworthy. See Sure-Tan, Inc, v. NLRB, 467 U.S. 883, 900 (1984) which makes it clear that: "*...Board's remedies must compensate for actual injuries suffered by the employees rather than speculative consequences of unfair labor practices.*"

The AGC also failed to address Respondent Exceptions that the Board in its 2006 decision never ordered Respondent to reimburse or "make whole" the Health Plan. They cite *Kraft Plumbing and Heating Inc.*, 252 NLRB 891 (1980) and others, but those cases are distinguishable from the case before the Board. In the instant case the **Board never ordered** reimbursements to the Health Plan. In all of the cases cited by the ALJ and AGC in every single instance a specific order to reimburse the Health Plan was explicitly made part of the remedy.

The AGC further does not address the Exception that it, the Union and Health Plan frustrated and impeded the negotiations process from 2003 to present resulting in an impasse. While it is true that Union conduct is no defense in an unfair labor violation proceeding, it is relevant in a compliance hearing to show impasse, and the failure of the parties to bargain in "good faith."

The AGC supports the finding of the ALJ that Pearson daughter was disable, but offer no case law, or statute that allows for such a finding without medical or expert evidence as to the daughter's specific medical illnesses.

The AGC argues in support of the ALJ finding that the prescription summaries were properly admitted, but offers no statute (Rule of Evidence) or case law that allows a

person (not authorized by the Evidence Code) to present to the court hundreds of pages of prescription summaries as authentic, and as an exception to the hearsay rule.

1. Respondent's reply to the Acting General Counsel and charging party response to Exception #1.

The AGC response to Exception #1 is overly simplified. True the ALJ is not bound by Ninth Circuit law, however as stated in Respondent's brief Board decisions adopted in Ninth Circuit decisions are binding on the Board, i.e., *Planned Building Services, Inc. v. NLRB*, 347 NLRB 670, 2006, citing *Advanced Stretchforming,* 233 F.3d at 1181-83; K*allman v. NLRB,* 640 F.2d 1094 (9th Cir. 1981) as sources for ruling/finding of facts and law. Supreme Court decisions such as, Sure-Tan, Inc, v. NLRB, 467 U.S. 883, (1984). *Porter Co. v. NLRB*, 397 U.S. 99 (1969) are binding on the ALJ.

However the real issue here is: *The ALJ decision and AGC failure in his responses to explain under what law they are relying on to support their contention that Respondent was ordered by this Board in the first instance to make backpay premium payments to the health plan where no explicit order is contained in the Board's decision. The ALJ simply says it is implied in the Board's order* (ALJD at 10).

The primary tenet of judicial and administrative power to act is through its decisions, orders and judgments. If a judicial or administrative tribunal does not specify its directives in its decisions, orders or judgments, a party is not bound, or required to act outside of the order, decision or judgment. No-where in the Board's order does it specify that Respondent must make retroactive premium payments to the Trust Fund (Healthcare Fund). The ALJ is without power to rewrite Board orders.

The Board order in the instant case is clear in its directive:

> *...retroactively restore the terms and conditions of employment of the employees in the unit as established*

by the collective-bargaining agreement between JLL and the Union and make employees whole for any losses they incurred as a result of unilateral changes made thereto. Board's Order and (Remedy). GC Exhibit 1(a), also See at 347 NLRB 192, 196-197, 208-209 (2006).

No case cited by the ALJ in his decision or in AGC response states that reimbursement to a Fund can be implied when not specifically order by the Board, not *Triple A Fire Protection, Inc.,* 357 NLRB No. 68 (2011), not *Kraft Plumbing and Heating Inc.*, 252 NLRB 891 (1980) or others cited in Respondent's Brief. However, the one thing that all these cases have in common *unlike the instant case* is that the Board explicitly ordered backpay reimbursement to the Funds. I*n this case the Board did not.*

2. Respondent's reply to the Acting General Counsel responses to Exceptions #2-3 not allowing Respondent to present evidence of impasse. Or, allow Respondent to present evidence that the CBA had been modified by its predecessor JLL.

There again the AGC argument is over simplified, the 9th Circuit decision in the instant case stated that the Board is to follow principles cited in *Planned Building Services, Inc. v. NLRB*, 347 NLRB 670, 2006. Respondent Exhibit A.

P*lanned Building Services, Inc,* follows principles set out in the U.S. Supreme Court case of *San-Tan, Inc. v. NLRB,* 467 U.S. 883, 902 (1984), "*...that the compliance hearing is the appropriate forum for adjudicating what would have occurred had lawful bargaining taken place."* P*lanned Building Services, Inc,* at 676, fn. 25.

The principle of law explicit in *Planned Building Services, Inc. v. NLRB*, 347 NLRB 670, 2006, *"...permit the Respondent, in a compliance proceeding to present evidence establishing that it would not have agreed to the monetary provisions of the predecessor employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement*

that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals..." Id. at 676.

Under *Planned Building Services, Inc.,* allowing Respondent to present evidence of impasse between Smoke House predecessor JLL and the Union. Or, to allow Respondent to present evidence that the collective bargaining agreement had already been changed by Smoke House predecessor JLL is not a re-litigation of prior issues.

3. Respondent's reply to the AGC responses to Exceptions #4-9. ALJ did not allow Respondent to present evidence of impasse between the parties. Denied Respondent the opportunity to present evidence of impediments to collective bargaining by the Union, GC office and HERE Health, which led to an impasse.

The ALJ did not allow Respondent to present any live testimony of impasse after May 1. 2003. Tr. 6:9:25, 7:1:25, 33:13:25, 34:1:25, 35:1:9, 43:6:13, 46:15:25, 47:1:4. Spencer Tr. 209:13:19, 217:25, 218:1:25, 219:1:13, R. Ex. F (rejected). He then makes a finding of fact that Respondent failed to meet its burden of proof. (ALJD at 9-10) Such a finding is an abuse of discretion, where the ALJ denied Respondent the right to present its defenses, and then blame Respondent for failure to meet its burden of proof. Which is the very antitheses to the principles set forth in P*lanned Building Services, Inc,* at 676.

Likewise, the ALJ findings that neither the Union nor GC impeded negotiations, (ALJD at 11) is an abuse of discretion. The Union, Trust Fund and General Counsel from the very first meeting (negotiations) doggedly insisted that negotiations could not start in good faith until Respondent make back-payment to the Trust Fund at a per hour, per unit employee rate of $2.90, which was two times higher than that required by the CBA contract rate of $1.43. These facts are undisputed.

It is also an undisputed fact that the Union, Trust Fund and General Counsel did not reverse their unreasonable and untenable position requiring escalating premium

payments for the Trust Fund until the day of the Compliance Hearing GC Ex. 11, Appendix A, D. Pierce Tr. 148:3:8, 148:13:21. N. Pereira Tr. 10, 13:12:25, 14:1:14.

4. Respondent's reply to the AGC responses to Exceptions #5-6, 14 The ALJ decision that the Union nor GC had to present evidence that unit employees have a future stake in the viability of the health plan. That Respondent is responsible for backpay premiums to an employee (healthcare only fund) without a showing of employees' future interest in the plan, and without a showing of employee losses or HERE Health loses.

Because of the ALJ's ruling that neither the Union or GC needed to prove employees interest in the future viability of the health plan "*no evidence on the subject matter was introduced or admitted into evidence.*" Tr. 39:17:25, 40:1:9, 26:24:25, 27:1:25, 28:1:24, 29:1:25, 30:1:13. Notwithstanding the undisputed fact that the Trust Fund is purely a healthcare plan. Respondent (R), Exhibit U.

The ALJ realizing the fatality of his ruling in his decision (ALJD) 7-8 recites arguments not facts to support his flawed decision. Without proof of employees' future stake in the viability of an healthcare only plan this Board cannot support the finding of the ALJ, to do so would be the equivalent of finding *strict employer liability* for unfair labor violations regardless of whether employees have a future interest in the viability of the fund—where the mere existence of the fund is sufficient to impose liability.

Such a ruling would be contrary to U.S. Supreme Court, Ninth Circuit and Board precedence. See *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 900 (1984)., *Sedgwick Realty LLC,* at 248, fn. 8 (2001), *NLRB v. Harding Glass Co., Inc.,* 500 F.3d 1, 8 (1st Cir. 2007), quoting, *Manhattan Eye Ear & Throat Hosp.,* 300 NLRB, 201, 201-02 (1990), enforcement denied, 942 F2d 151 (2d Cir. 1991), *Planned Building Services, Inc. v. NLRB*, 347 NLRB 670, 2006, which cites *Advanced Stretchforming,* 233 F.3d at 1181-83; K*allman v. NLRB,* 640 F.2d 1094, 1102-03 (9th Cir. 1981).

5. Respondent's reply to the AGC responses to Exceptions #10-11 a "make whole" remedy beyond the termination date of the CBA is punitive in nature.

Porter Co. v. NLRB, 397 U.S. 99, 104-106, 109 (1969). The Board "...is without the power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." Id. at 102. Any "make whole" remedy, which subjects an employer to continuing liability beyond the termination date of the collective bargaining agreement is punitive and unenforceable. *Rayner v. NLRB*, 665 F2d 970, 976 (1982).

The Board may not be bound by Ninth Circuit law, but it is not prohibited from following it in appropriate cases. As in the instant case where it was the union, GC and the Health Fund that impeded negotiations by insisting throughout negotiations that Respondent pay backpay premiums at twice the contract rate than that called for in the CBA without negotiations, which created the impasse.

The court in *NLRB v. Dent*, 534 F2d 844 (9th Cir. 1976), faced the same issue as in this compliance hearing where the Board "make whole" remedy included a backpay remedy that ran three and half years longer than the CBA agreement, stated that such a remedy is a punitive and unenforceable. *Dent*, at 846-847, *Kallman*, at 1103.

6. Respondent's reply to the AGC responses to Exception 6.

The United States Supreme Court in Sure-Tan, Inc, v. NLRB, 467 U.S. 883, 900 (1984) made it clear that: "*...Board's remedies must compensate for actual injuries suffered by the employees rather that speculative consequences of unfair labor practices.*"

Unit employees had four (4) health plans to choose from with varying degrees of co-pay, deductibles, premiums and medical related costs. The compliance officer

testified that notwithstanding that she have access to the employees, and to which particular plans each employee belong to, she opted to use the plan she felt was most advantageous to the employees, whether it was the plan they participated in or not. Such intentional misrepresentation of the true facts makes General Counsel's calculation meaningless in the determination of the actual medical losses incurred by each unit employee. The ALJ findings and conclusions were in error and based on speculative and erroneous facts.

7. Respondent's reply to the AGC responses to Exceptions #15-20. No evidence of Pearson's daughter's disability. No legal bases for the ALJ finding that Pearson's daughter is disable. No evidence that Pearson paid for her and her daughters medical and prescription drugs bills. The ALJ erred in admitting the prescription summaries. The ALJ erred in ignoring evidence of payments for medical/drugs by Workers Comp. The ALJ erred in omitting evidence of drug payments resulting from the Mold case settlement.

(A-B) The ALJ at (ALJD pg. 6:13:15) *"I credit [Pearson] testimony, that her daughter...has been diagnosed by her physicians with epilepsy, fibromyalgia, pain, muscle spasms, an overactive bladder, and allergies."* This is an abuse of the ALJ's discretion under FRE, Rules 701, a lay person may not testify as an expert, or give an opinion based on scientific, technical or specialized knowledge. FRE, Rule 602 states, a lay witness may only testify as to things within their personal knowledge. Also see FRE, Rule, 801 an out of court statement to prove the truth of the matter asserted is hearsay.

(C) Pearson claim loss of monies paid for premium/medical expenses, but failed to produce any receipts of payments. Pearson Tr. 126:13:16. D. Pierce Tr. 185:13:16. Pearson claimed over $9,000.00 for medical expenses for hundreds of drug prescriptions over a four year period, but did not, or could not produce a single document evidencing

payment in any form, i.e., cancel checks, debit statements, or physical receipts. Pearson Tr. 126:13:16, D. Pierce Tr. 185:13:16. GC Exhibits 5, 6.

(D) Pearson appeared in court with several hundred pages of paper with numerous medical terms, numbers and medical codes that she could not interpret. The ALJ admitted the bundle of papers as official documents from two drug stores without certification from the custodian of records as required by FRE, Sections 902 (11), 1001, 1002. Or, established an exception to the hearsay rule. FRE, Rule, 801

(E) Evidence of payment for drugs from other sources is admissible to prove the employee suffered no out-of-pocket losses.

(F) The reason there was no evidence of what the Mold case settlement paid for is because the ALJ precluded Respondent from offering the evidence. Tr. 120:23:25, 121:1:25, 123:1:25, 124:1:18, 132:6:11, 127:1:7, 127:8:25, 128:1:25, 129:1:22.

8. Respondent's reply to the AGC responses to Exceptions #21-23. The ALJ erred in granting HERE Health's Petition Revoking Respondent's Subpoena Duces Tecum, and partially granting Local 11 petition Revoking Respondent's Subpoena Duces Tecum. The ALJ abused his discretion in refusing to rule on Respondent's Motion to Introduce Evidence of Modification of the CBA by the parties.

The ALJ decision granting HERE Health, and Unite HERE Local II Petition to Revoke Respondent's Subpeona Duces Tecum barred Respondent from obtaining vital evidence related to its defenses consistent with the principles of law explicitly stated in *Planned Building Services, Inc. v. NLRB*, supra. "That in a compliance hearing the employer may present evidence showing it would not have agreed to the bargaining provisions of its predecessor, and to establish a date of impasse or agreement." Id at 676.

Because of this bar the ALJ could say that: *"There no evidence that neither party gave notice to terminate the collective-bargaining agreement,"* (ALJ 3:29:30). However,

it was because the ALJ would not allow Respondent to present evidence of notice to terminate the CBA by JLL. Respondent Exhibit, KK, and refused to rule on Respondent's motion to introduce evidence of prior modification of the CBA by the parties.

The barred evidence consisted of evidence of negotiations between Respondent's predecessor, memoranda evidencing the reopening of the contract, subsequent termination of the prior CBA, and admissions by the Union that there no-longer existed a CBA between the parties. See Tr. 29:1:25, 30:1:13, 26:24:25, 27:1:25, 28:1:24, Respondent Exhibit QQ.

9. Respondent's reply to the AGC responses to Exception 24. The ALJ abused its discretion barring financial evidence during the relevant period of negotiations as evidence of what Respondent could reasonably financially agree to in any new collective bargaining agreement.

The financial status of Respondent goes to the issue of good faith negotiations, and realistically how much Respondent could afford to agree to in a new CBA. Contrary to the ALJ statements in his findings and conclusions (14:31:38)

WHEREFORE, Respondent requests the Board to deny enforcement of the "make whole" remedy as to the Trustee Fund, and limit liability to unit employees to the date of impasse, or date the collective bargaining agreement terminated between JLL, Inc., and the Union on September 15, 2003.

Date: May 2, 2013

Leon Jenkins, Representative
For Smoke House Restaurant,
Inc., 4420 Lakeside Drive,
Burbank, Ca. 91505
310-904-8371
leonjenkins@verizon.net

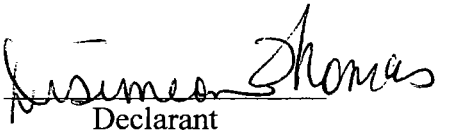
CERTIFICATION OF SERVICE

STATE OF CALIFORIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am not a party in the within action, and I hereby declare that on May 2, 2013, I served the foregoing documents via electronic mail described as RESPONDENT'S REPLY TO THE ACTING GENERAL COUNSEL, AND CHARGING PARTY'S RESPONSES TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION on:

Mori Pam Rubin, Region Director, Region 31, National Labor Relations Board, mori.rubin@nlrb.gov, and Nicole Pereira, Esq. nicole.pereira@nlrb.gov at 11150 W. Olympic Blvd., Suite 700, Los Angeles, Ca. 90064-1824, Ellen Greenstone, Esq., egreenstone@rsglabor.com, Rothner, Segall, Greenstone, 510 South Marengo Ave., Pasadena, Ca. 91101-3115, Kirill Penteshin, Esq. kpenteshin@uniteherell.org H.E.R.E. Local 11, 464 S. Lucas Ave., Suite 201, Los Angeles, Ca. 90017, and Henry Willis, Esq., hmw@ssdslaw.com Schwartz, Steinsapir, Dohrmann & Sommers 6300 Wilshire Blvd., Ste. 2000, Los Angeles, Ca. 90048.

I declare under penalty of perjury that the above is true and correct.



Declarant